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September 21, 2000

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Ex Parte Presentation

Re: **REQUEST FOR FILING WINDOW AND AUCTION PROCEDURE**

ET Docket Number 98-206 (Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range) and Associated Terrestrial Applications (e.g., Northpoint Communications)

Dear Ms. Salas:

On behalf of our client, the National Rural Telecommunications Cooperative ("NRTC"), this is to express our concern with regard to the above referenced rulemaking proceeding ("Rulemaking Proceeding") and associated applications that seek to use satellite frequencies 12.2-12.7 GHz for terrestrial distribution purposes. As evidenced by the number of terrestrial applications filed to date -- even though the Commission has not yet established an application filing window for terrestrial applications in this band -- this spectrum apparently offers great potential for terrestrial services. NRTC urges the Commission to grant no regular terrestrial operating privileges for this band without first

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opening a Filing Window, receiving applications from all interested parties, and, if necessary, conducting a spectrum auction to award licenses.

In addition to promoting new technologies and ensuring the efficient use of scarce and valuable spectrum, a Filing Window and spectrum auction will ensure a full and fair opportunity for all interested parties to participate in this revolutionary development. It would be patently unfair and contrary to the public interest for the Commission to award regular licenses at this stage of the proceeding without first formally opening an unambiguous Filing Window, accepting competing applications and conducting competitive bidding.

NRTC History.

NRTC is a non-profit cooperative association comprised of 550 rural electric cooperatives and 279 rural telephone systems, as well as several non-member affiliate organizations, located throughout 48 states. NRTC's mission is to meet the telecommunications needs of American consumers living in rural areas. In furtherance of that mission, NRTC paid more than \$100,000,000 to DIRECTV in 1992 to capitalize the launch of the DIRECTV satellite business in 1994. In return, through a DBS Distribution Agreement between NRTC and Hughes Communications Galaxy, Inc. (DIRECTV's predecessor-in-interest), NRTC received program distribution and other rights to market and distribute DIRECTV programming services throughout large portions of rural America. NRTC, its members and affiliates currently market and distribute DIRECTV programming to more than 1,600,000 rural households using DBS technology in the 12.2-12.7 GHz band.

Northpoint and Related Applications.

On January 8, 1998, Diversified Communications Engineering, Inc. (affiliated with Northpoint Communications, and hereinafter referred to as "Northpoint") filed an application for modification of Experimental Radio license for Station WA2XMY.¹ This station was previously granted an Experimental Radio license for a transmitting antenna at King Ranch, Texas. By the modification application, Northpoint sought to add an additional transmitting antenna at Austin, Texas. Through its experimentation, Northpoint was seeking to determine whether simultaneous co-channel terrestrial signals could be transmitted on frequencies in the 12.2-12.7 GHz band assigned to the Direct Broadcast Satellite ("DBS") service without causing harmful interference to DBS receivers.

On March 6, 1998, Northpoint filed a Petition for Rulemaking with the Commission aimed at providing terrestrial retransmission of local television signals and one-way data services to DBS receivers in the 12.2-12.7 GHz band on a secondary basis

¹ See File No. 6001-EX-MR-1998.

to Broadcast Satellite Service ("BSS") operations. Northpoint stated that its proposal would allow DBS subscribers to receive local television programming and one-way data services with minimal additional equipment, thereby permitting the DBS service to compete more fully with cable television services. The Petition for Rulemaking was submitted at the same time that Northpoint was conducting various experimental tests with this technology in both Kings Ranch, Texas,² and Washington, D.C.³

As the Commission is well aware, Northpoint's tests proved to be very controversial due to the possible interference problems between potential terrestrial users and current DBS licensees. DirecTV and EchoStar have been particularly adamant that the approval of Northpoint's technology would have a disastrous effect on DBS licensees. In June and July of 1999, DirecTV and EchoStar filed Petitions with the Commission seeking the immediate cessation of Northpoint's testing.⁴ Nonetheless, the Commission continued to express a keen interest in exploring the potential benefits of the Northpoint technology.⁵

On April 18, 2000, Pegasus Communications ("Pegasus"), a former critic of Northpoint's efforts, filed an application virtually identical to Northpoint's.⁶ Northpoint claims that the Pegasus application is a mere anti-competitive ruse. Additionally, Northpoint has asserted that the Pegasus application is invalid because it was not filed during an alleged filing window.⁷

To further confuse the matter, Satellite Receivers Ltd. ("SRL"), a longtime C-band equipment retailer and programming packager located in Green Bay, Wisconsin, recently submitted yet another application almost identical to that of Northpoint. SRL states that it seeks to deliver a terrestrial service in the Midwest to augment its C-band business and complement DBS systems. Once again, although Northpoint apparently has not officially responded, public statements indicate that it will oppose SRL's application on the grounds that it was filed too late.⁸

² Diversified Communications Engineering, Inc., *Application For Modification of Experimental Radio License*, File No. 6001-EX-MR-1998 for Station WA2XMY, filed January 8, 1998.

³ Diversified Communications Engineering, Inc., *Application for Special Temporary Authority*, File No. 0094-EX-ST-1999, filed March 12, 1999.

⁴ See DirecTV's *Application for Expedited Review and Request for Immediate Suspension of Testing*, filed June 25, 1999, and EchoStar's *Emergency Petition for Cease and Desist Order*, filed July 26, 1999.

⁵ See Public Notice, DA 99-1838, released September 9, 1999 (where the Commission states that Northpoint's proposed experimentation is likely to produce data that will be useful to the Commission in evaluating the sharing potential between terrestrial and DBS services in the 12.2-12.7 GHz band.).

⁶ See Application of Pegasus Communications, April 18, 2000. Pegasus distributes DIRECTV programming through a Member Agreement with NRTC and pursuant to NRTC's DBS Distribution Agreement with DIRECTV.

⁷ As discussed below, Northpoint filed its non-NGSO application during a filing window for NGSO applications.

⁸ *Satellite Receivers Enters Northpoint Fracas*, Satellite Business News Fax Update, Friday September 8, 2000 at 1.

Northpoint maintains that the applications of both Pegasus and SRL are invalid because they were filed outside of an alleged "application window." However, the Commission never opened a Filing Window or set a filing deadline to accept Northpoint's application or any other *terrestrial* applications in the DBS band.

Rather, the application window to which Northpoint is referring was established during the Rulemaking Proceeding for an entirely different purpose. The Commission set a January 8, 1999 Filing Window for the specific purpose of filing non-geostationary satellite orbit ("NGSO") applications,⁹ not terrestrially-based applications such as Northpoint's. Eight NGSO Applications were filed during the NGSO Window, none of which offered the type of terrestrial communications proposed by Northpoint.

NRTC Comments.

If viable, Northpoint's proposed technology has broad public interest implications. It could significantly alter the manner in which advanced telecommunications services are provided to the American public. In the event that the Commission determines in the Rulemaking Proceeding to authorize the shared use of operations in the Ku-band between terrestrial and satellite licensees, it is imperative that all interested parties be ensured a full and fair opportunity to participate.

NRTC is dedicated to ensuring that rural Americans -- a segment often overlooked in the provision of advanced telecommunications services-- have access to advanced telecommunications services. Northpoint-like terrestrial operations in the DBS band may offer significant opportunities to serve rural and other parts of America. For that reason alone, the Commission should encourage broad participation in the application process, thereby ensuring that this spectrum is developed to its full potential. The nurturing of robust competition will make certain that the Commission best meets its statutory mandate to promote the public interest, convenience and necessity.¹⁰

In order to ensure that all applicants have a full and fair opportunity to participate in providing these types of services, the Commission must open an unambiguous Filing Window, accept competing applications and engage in a competitive bidding proceeding. Northpoint has consistently denied the legitimacy and necessity of any type of spectrum auction on several grounds. First, Northpoint maintains that there are no other valid competing applications. Second, Northpoint maintains that current federal statutes prohibit the auctioning of satellite spectrum. Finally, Northpoint has alleged that a

⁹ See, FCC 98-310, *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku- Band Frequency Range*, ET Docket No. 98-206, ¶171; and See, *Cut-off Established for Additional Applications and Letters of Intent in the 12.75-13.25 Ghz, 13.75-14.5 Ghz, 17.3-17.8 Ghz and 10.7-12.7 Ghz Frequency Bands*, Report No. SPB-141, released November 2, 1998.

¹⁰ 47 U.S.C. 151.

Pioneer's Preference would be appropriate in the case at bar. Northpoint's overall analysis of the situation, however, is seriously flawed.

First, as addressed previously, Northpoint is wholly incorrect in arguing that Northpoint -- and only Northpoint -- has submitted a "valid" application. Since no formal application process has ever been established by the Commission for this type of service in this band, Northpoint is entitled to no special equities as a result of filing its application "first." Other, later-filed applicants are presumably entitled to every bit as much consideration as Northpoint. The problem, however, is that the Commission has never formally invited *all* interested parties to file applications. There has never been a clear, unambiguous Filing Window. Instead, applications have been submitted piecemeal due to the uncertainty of the regulatory status of the filing procedure. An unambiguous Filing Window should be established by the Commission so that *all* applications can be processed fairly and openly.

Second, although Northpoint is correct in asserting that there is a prohibition on auctions for *international* satellite applications,¹¹ the Commission is *required* to initiate an auction in the event of mutual exclusivity in domestic applications.¹² This distinction is important, because the terrestrial applications in questions do not rise to the level of "international satellite applications." Further, at a minimum, it is fair to say that uncertainty exists as to the status of "mutual exclusivity" vis a vis the Northpoint, Pegasus and SLR applications. Thus, the domestic nature of the terrestrial applications in question, as well as the apparent mutually exclusivity of the current applicants, clearly compels the Commission to announce an unambiguous filing procedure and conduct auction in accordance with the Commission rules.¹³ In fairness, a Filing Window should be opened to all interested applicants so that mutual exclusivity may be clearly established by any applicant interested in providing terrestrial services in the DBS band.

Finally, Northpoint seems to imply that it has developed this technology and, therefore, it is entitled to some type of special treatment in the nature of a "Pioneer's Preference"¹⁴ By auctioning the spectrum, Northpoint argues that the Commission would somehow be discouraging the development of new and innovative technologies and hindering spectrum efficiency. Furthermore, Northpoint maintains that "subjecting" Northpoint to an auction would somehow be inequitable.¹⁵ In fact, however, the Commission long ago banned the use of pioneer preferences in the assignment of spectrum, and, by law, cannot engage in their use now.¹⁶ The auctioning of spectrum has arguably been one of the driving forces behind the recent explosive growth in new

¹¹ Communications Satellite Act of 1962, §647.

¹² 47 U.S.C. 309(j).

¹³ 47 U.S.C. 309(j).

¹⁴ See *Ex Parte Submission of Northpoint Technology, Ltd. And BroadwaveUSA*, ET Docket No. 98-206, dated August 29, 2000, at 14 (stating that subjecting Northpoint to a possible auction would somehow punish, not encourage, innovation).

¹⁵ *Ex Parte Submission of Northpoint*, August 29, 2000, at 14.

¹⁶ 47 U.S.C. §309(j)(13)(F).

telecommunications services. The Commission has long recognized that auction policies promote the efficient use of new technologies. Auctions are fast, fair and efficient and set the stage for robust competition. Additionally, they generate much needed revenues for the U.S. Treasury -- rather than conferring unjustified benefits on private parties without just compensation to the American public. Northpoint's arguments against spectrum auctions are nothing more than a self-serving attempt to maintain its tenuous foothold on valuable spectrum.

As the Commission knows, this has been a long, contentious and unprecedented proceeding. The possibility of exceptional and unforeseen implications for the DBS, cable and broadcast industries as well as the American public, are evidence enough for the Commission to tread cautiously. Despite Northpoint's pleadings to the contrary,¹⁷ the Commission must proceed in a manner that promotes the broad public interest in all respects.

The Commission should not authorize Northpoint or any other entity to provide terrestrial services in the DBS band without first providing all entities with a full, fair and open opportunity to submit competing applications. By establishing an unambiguous Filing Window, accepting competing applications and conducting an auction, the Commission will ensure that all applicants have an opportunity to participate in and pay for the use of this valuable spectrum. In that manner, the Commission will best promote the utilization and development of these frequencies throughout the country.

Sincerely,



Jack Richards

Attached: Certificate of Service

¹⁷ See *Ex Parte Submission of Northpoint Technology, Ltd.*, ET Docket No. 98-206, filed August 29, 2000 (urging the Commission to grant the pending applications).

CERTIFICATE OF SERVICE

I, Kevin G. Rupy, hereby certify that a copy of the foregoing Ex Parte submission of National Rural Telecommunications Cooperative, this 21st day of September, 2000, has been delivered via courier and first class U.S. mail (*) to the following:

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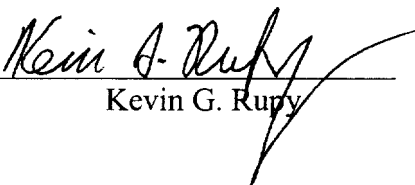
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